

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-916

OCEAN DRILLING AND EXPLORATION
COMPANY,

Petitioner

versus

QUALITY EQUIPMENT, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Quality Equipment, Inc., respectfully requests that this Court deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE HOLDING OF THE COURT OF APPEALS THAT THE
INDEMNITY PROVISION OF PARAGRAPH 9 OF THE
MASTER SERVICE CONTRACT IS AMBIGUOUS IS SUP-
PORTED BY LOUISIANA LAW AND IS NOT IN DIRECT
AND IRRECONCILABLE CONFLICT WITH CONTROLL-
ING LOUISIANA JURISPRUDENCE

Initially, the Petitioner has chosen to divide all Louisiana jurisprudence regarding indemnity contracts into two categories, namely, cases in which the indemnitor agrees to hold the indemnitee harmless from any liability which may be imposed upon him as a result of the indemnitee's actions and cases in which the indemnitor also agrees specifically to indemnify the indemnitee for the indemnitee's own negligence. In support of this distinction, the petitioner cites *Hospital Service District No. 1 v. Delta Gas, Inc.*, 171 So. 2d 293 (La. App. 1955). A careful reading of that opinion, especially the language distinguishing the above cited case and *Buford v. Sewerage and Water Bd. of New Orleans*, 175 So. 110 (La. App. 1937), reveals that the Court distinguished the two cases on the basis that an insurance agreement was in effect in the former case but not the latter. *Hospital Service District No. 1 v. Delta Gas, Inc.*, supra at 300. No comment was made with respect to a distinction between indemnity stipulations which expressly include an assumption of liability for the indemnitee's negligence from those in which such an undertaking is not expressed. Thus, the fact that the Fifth Circuit, in supporting its finding of ambiguity of ODECO's indemnity agreement, relied on Louisiana cases which interpreted indemnity agreements which did not include an assumption of liability for the indemnitee's negligence was proper under Louisiana jurisprudence.

Additionally, the Respondent submits that the Fifth Circuit was correct in adopting the rules of construction set forth in well-settled jurisprudence which did not interpret an indemnity provision that included a clause requiring an assumption of indemnification when the indemnitee was negligent. See: *Brown v. Seaboard Coast R.R. Co.*, 554 F.2d 1299 (CA5 1977) (The mere use of the phrase "any and all

claims" in an indemnity clause does not suffice unambiguously to sweep within it the literal reach of the words used.); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410, 414 (CA5 1958) ("it is an area in which to cover all does not include one of the parts"); *Green v. Taca International Airlines*, 304 So.2d 357 (La. 1974) (a contract of indemnity will not be construed to indemnify indemnitee against losses resulting to him through his own negligence, where such intention is not expressed in unequivocal terms); *Arnold v. Stupp Corp.*, 205 So.2d 797 (La. App. 1967) ("any and all liability"); and *Buford v. Sewerage and Water Bd. of New Orleans*, supra ("all suits or actions of any name or description"). From these rules of construction, which are applicable in the interpretation of all indemnity agreements, the Fifth Circuit properly concluded that while Quality Equipment is required to indemnify ODECO for losses caused by ODECO's own negligence any application of the indemnification agreement to a particular subclass of claims, specifically pre-existing defects or negligence, creates an ambiguity.

The next major Louisiana case which the Petitioner sets forth in support of its claim that the indemnity agreement in the case at bar is unambiguous is *Jennings v. Ralston Purina Co.* 201 So.2d 168 (La.App. 1967); cert. denied 203 So.2d 554. In that case, the Court determined that an indemnity provision must be strictly construed. However, in construing the provision the Court apparently misread the indemnity provision and added an extra phrase to the provision when it stated:

. . . (W)e cannot conceive of any conclusion which would detract from the clearly quoted, specifically stated and thoroughly comprehensive obliga-

tion on the part of Efurd to indemnify Ralston against *any damage or injury arising out of the performance of the contract* whether or not such damage resulted from Ralston's negligence. *Jennings v. Ralston Purina Co.*, supra at 175.

The Court should not have included the phrase "whether or not such damage resulted from Ralston's negligence". A Louisiana commentator has opined that had the Court not misread the agreement by adding the above mentioned phrase and instead defined the indemnitor's obligation "as one simply to indemnify for loss, damage or injury 'resulting from the performance of the contract', the Court would have undoubtedly denied Ralston indemnification for its own negligence." Borrello, *Contractual Indemnity: Interpretation and Effect*, 26 La. B.J. 90, 95.

Further, the reading by the Court of the extra phrase is inconsistent with numerous Louisiana cases, including, *Buford v. Sewerage and Water Bd. of New Orleans*, supra, and *Cole v. Chevron Chemical Company*, 477 F.2d 361 (CA5 1973). In each of these decisions, the Court determined that indemnification claims "arising out of" contractual performance are not sufficient to cause the indemnitor to be obligated to protect against the indemnitee's negligence. Accordingly, *Jennings v. Ralston Purina Co.*, supra, the very case which the Petitioner claims to be at variance with the Fifth Circuit's decision, is itself at variance with Louisiana jurisprudence.

The Petitioner next directs this Honorable Court's attention to *Polozola v. Garlock, Inc.*, 343 So.2d 1000 (La. 1977), where the Louisiana Supreme Court determined an indem-

nity agreement, which included explicit reference to the indemnitee's negligence, to be enforceable. The question of ambiguity was raised because in three instances in the indemnity provision the indemnitee was named as "Dow, its agents, servants and employees", while in the fourth instance, specifically relating to the indemnitee's negligence, only the term "Dow" was used. Upon applying the rule of construction that when there is doubt as to the true sense of the words of a contract, they may be interpreted by referring to other words and phrases in the same contract, the Court determined that no ambiguity existed. *Polozola v. Garlock, Inc.*, supra at 1003. Further,

"when there is anything doubtful in agreements, including indemnification agreements, we must endeavor to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the parties. La. Civil Code Art. 1950 (1870)".

Polozola v. Garlock, Inc., supra at 1003.

There are no other words or phrases in the ODECO Master Service Contract to which reference can be made to resolve the ambiguity concerning the coverage of pre-existing defects.

Thus far, the Louisiana jurisprudence which the Petitioner contends is at variance with the Fifth Circuit's opinion in the case at bar has been shown to support the finding that Paragraph 9 of the Master Service Contract is ambiguous rather than show that provision was unambiguous. The cited cases do not show that the indemnification agreement is "clear, specifically stated, thoroughly comprehensive and unambigu-

ous." (Petitioner's Brief p. 10) It is respectfully submitted that there exists no conflict between the decision of the Fifth Circuit and controlling Louisiana jurisprudence.

In support of its contention that the Fifth Circuit was proper in holding the indemnity provision ambiguous, the Respondent cites *Lee v. Allied Chemical Corporation*, 331 So. 2d 608 (La. App. 1976). The plaintiff in that case was complaining of a condition of the premises. However, in addition to agreeing to indemnify Allied for its own negligence, the indemnitor agreed to indemnify Allied for ". . . injury, death, or damage which may have been caused by . . . the condition of the premises or otherwise." The Court determined that the inclusion of the phrase "the condition of the premises" enumerated the conditions, in addition to the negligence of the indemnitee, under which indemnification would be operative. No such clause is included in ODECO's Master Service Contract. It is submitted that the Fifth Circuit was correct in that the indemnity provision is ambiguous since the pre-existing defects are not specifically enumerated.

The Petitioner further contends that decisions of federal courts sitting in Louisiana and applying Louisiana law support its claim that the indemnity provision is unambiguous. None of the cases cited involved a claim of ambiguity of the indemnity provisions with respect to a pre-existing defect or negligence on the part of the indemnitee prior to engaging in work pursuant to a service contract. All of the cases were determined either on the issue of whether the injury was incident to or arising out of work being performed by the indemnitor or whether or not the agreement provided indemnification for the indemnitee's negligence. Since none of the

cases cited by the Petitioner involved a pre-existing defect or negligence, they can have no controlling effect on the case at bar. It is clear that in order to properly treat this issue it was necessary for the Fifth Circuit to analyze it in light of existing Louisiana jurisprudence as discussed above.

To contend as the Petitioner has done that the provisions are clear and unambiguous and are thus enforceable is to ignore the factual circumstances and situations which surround the relationships of all the parties. The contract is a form contract drafted by the Petitioner, ODECO. The condition which caused the plaintiff's accident, a pre-existing defect in a ladder, was in existence prior to the execution of the contract by the parties. The ladder in question was constructed with ODECO's knowledge and under its supervision. It had knowledge of the fact that the ladder was inadequate and dangerous. Certainly, the intentions of the parties with respect to this condition or any like condition were not clearly expressed in the contract, particularly in light of the fact that ODECO knew of the condition before entering into the contract and now attempts to excuse itself and impose its liability on the Respondent by continuing to assert that a clearly ambiguous contract is unambiguous. The Respondent contends that the obligation to indemnify ODECO would be activated only when the negligent condition or act was subsequent to the execution of the indemnity agreement in question. None of the cases set forth by the Petitioner opposes that contention.

Certainly, no reasonable man could contend that the indemnification provision would be activated when a personal injury was caused by a condition which pre-existed the contract and of which only one party had knowledge. To so

contend would give retrospective rather than prospective effect to contracts. Under Louisiana law, where a dispute exists over the terms of a contract, the controversy must be resolved in light of the established principle that informed and experienced parties do not ordinarily bind themselves to unreasonable obligations. *Burt v. Hebert*, 338 So.2d 717 (La. App. 1976); *Makofsky v. Cunningham*, 576 F.2d 1223 (CA5 1978). This is borne out by the trial testimony of Mr. Max Harding, President of Quality Equipment, Inc. Mr. Harding's testimony resolved the ambiguity of the indemnity provision when he testified that the parties did not intend to cover injuries caused by pre-existing defects. *Mott v. Ocean Drilling & Exploration Company*, 577 F.2d 273, 278 (CA5 1978).

If it is determined that the decisions of federal courts applying Louisiana law are relevant despite factual dissimilarity, the Respondent contends that the cases exhibit an adherence to the rules of construction of indemnity provisions in Louisiana. Specifically, in *Day v. Ocean Drilling & Exploration Co.*, 353 F.Supp. 1350 (E.D.La. 1973), the Court considered the same Paragraph 9 of the Master Service Contract. The Court determined that under Louisiana law an indemnity agreement is to be read narrowly, but not disregarded. Additionally, the Court stated that the agreement must be given effect according to the intention of the parties. In the instant case, the Fifth Circuit did not disregard the indemnity agreement without first properly applying Louisiana rules of interpretation to determine the intent of the parties.

In *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (CA5 1975), the same ODECO indemnity provision was

held to be operative. However, the Fifth Circuit, in the instant case, is not primarily concerned with the clause "incident to, arising out of, in connection with . . ." as in *Hicks*. Instead, the Court was primarily concerned with the effect of a pre-existing condition on the indemnification provision. The argument that the incident was not "incident to, arising out of, in connection with . . ." is only secondary to the determination of the intent of the parties with respect to the pre-existing defect.

In *Cormier v. Rowan Drilling Co.*, 549 F. 2d 963 (CA5 1977), the Court was concerned with reciprocal indemnity provisions between Continental Oil Company and Rowan Drilling Company whereby each agreed to indemnify the other for any claims brought by their respective employees. Despite precise terms identifying their rights respecting a claim by their respective employees, the Court determined that the contract was silent as to the claims of third parties or the employee of a third party. Since the contract was silent on that important matter, the Court, without the benefit of the intent of the parties, determined that the contractual agreement of indemnity did not apply. The Respondent urges that the ODECO indemnity agreement is silent with respect to pre-existing defects and thus should not apply as was correctly determined by the Fifth Circuit.

Quality Equipment, Inc. respectfully submits that there is no direct conflict between controlling state precedent and the decision of the Fifth Circuit in the case at bar. Rather, it is submitted that the Fifth Circuit followed sound principles of contractual interpretation in concluding that the indemnity provision is ambiguous. Accordingly, a writ of certiorari should be denied.

II.

THE HOLDING OF THE COURT OF APPEALS THAT
THE INDEMNITY PROVISION OF PARAGRAPH 9
OF THE MASTER SERVICE CONTRACT IS
AMBIGUOUS RELIES UPON TEXAS RULES OF
CONTRACT INTERPRETATION BUT DOES NOT
CREATE A DIRECT CONFLICT WITH FEDERAL
STATUTES AND DECISIONS OF THIS COURT.

It is clear that Louisiana law is the applicable standard to utilize in determining this matter. Despite the fact the Fifth Circuit relied on a case which stated Texas principles of law, *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (CA5 1969), Respondent contends that the result would have been the same had Louisiana principles of contract interpretation been applied. The primary issue is the effect of the pre-existing defect and not whether the plaintiff's injury was "incident to, arising out of, in connection with . . ." the work of Respondent. However, both issues in this matter are unclear with respect to the intent of the parties given the fact situation involved. Under Louisiana law, when the terms of a written agreement are susceptible of more than a single interpretation, or where ambiguity or uncertainty exists as to the contractual provisions, or where the intent of the parties cannot be ascertained from the contract itself, parol evidence is admissible to clarify the ambiguities and to show the intentions of the parties. *Capizzo v. Traders and General Insurance Co.*, 191 So.2d 183 (La. App. 1966).

This conclusion, that Texas law and Louisiana law would produce the same result is supported in *Day v. Ocean Drilling*

& Exploration Co., *supra*. In that case, Judge Alvin Rubin stated that there was a "host of cases" in Louisiana and elsewhere dealing with the meaning to be attached to terms like "arising out of" and "in connection with" when used in indemnity agreements. Included in the cases elsewhere are *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, *supra*, and *Alamo Lumber Co. v. Warren Petroleum Co.*, 316 F.2d 287 (CA5 1963), the two cases relied upon by the Fifth Circuit in this matter. Judge Rubin further states that while the cases "deal with interpretation of the law of other states, or with matters arising in admiralty, they do not appear to be circumscribed by these differences. *Day v. Ocean Drilling & Exploration Co.*, *supra* at 1352. Thus *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, *supra*, would prescribe no result different from the application of Louisiana jurisprudence.

Again, Respondent contends that *Hicks v. Ocean Drilling & Exploration Co.*, *supra*, and other cases cited by the Petitioner are inapposite because of the ambiguity created concerning the intent of the parties with respect to indemnification for pre-existing conditions. Further, the Louisiana cases cited by the Petitioner concerning Louisiana law are inapposite as previously shown.

It is respectfully submitted that the Fifth Circuit applied case law, although of another jurisdiction than Louisiana, but that the result would be the same under applicable Louisiana jurisprudence. Accordingly, there exists no basis for the contention that inapplicable law created a conflict between statutes and decisions of this Court. The writ of certiorari should not issue because there is no real conflict to be resolved.

CONCLUSION

The Respondent respectfully submits that no conflict between the Fifth Circuit decision and Louisiana jurisprudence exists. Rather, Louisiana jurisprudence supports the decision of the Court of Appeals. Further, there is no real conflict between the Fifth Circuit decision and federal statutes and decisions of this Court. Additionally, the application of Louisiana jurisprudence would dictate the same result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for respondent has caused three copies of the foregoing Respondent's Brief in Opposition to be served on W. K. Christovich, C. Edgar Cloutier, Christovich & Kearney, 1815 American Bank Building, New Orleans, Louisiana 70130, and Joseph J. Weigand, Post Office Box 6062, Houma, Louisiana 70361, by placing same in the U. S. Mail, First Class, postage prepaid, this 29th day of January, 1979.

LAWRENCE E. ABBOTT